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12 IN THE UNITED STATES DISTRICT COURT

13 FOR THE DISTRICT OF NEVADA

14 UNION PACIFIC RAILROAD COMPANY, a
15 Delaware corporation,

16 Plaintiff,

17 v.

18 PILOT THOMAS LOGISTICS, THOMAS
19 WEST FUELS LUBRICANTS AND
20 CHEMICALS, LLC, SIMON PETROLEUM,
21 INC., and DANIEL S. MCCANN,

22 Defendants.

Case No. 3:22-cv-00117-LRH-CSD

**STIPULATION AND
PROTECTIVE ORDER**

23 WHEREAS, the parties to the above-captioned action (the “Action”), i.e., plaintiff
24 UNION PACIFIC RAILROAD COMPANY (“Plaintiff”), and defendants PILOT THOMAS
25 LOGISTICS, THOMAS WEST FUELS LUBRICANTS AND CHEMICALS, LLC, SIMON
26 PETROLEUM, INC., and DANIEL S. MCCANN, (“Defendants”) (individually, a “Party,” and
27 collectively, the “Parties”), acknowledge that during the course of the litigation of the Action
28 certain matters may be requested to be produced that may constitute or contain trade secret,
confidential research, development, financial, or otherwise proprietary commercial, information
(collectively, “Protected Information”) within the meaning of Rule 26(c) of the Federal Rules of
Civil Procedure (“Rule[s]”); and

1 WHEREAS, the Parties intend to protect such Protected Information from inappropriate
2 disclosure and use,

3 NOW, THEREFORE, IN LIGHT OF THE FOREGOING, the Parties, by and through
4 their respective attorneys of record in the Action, hereby stipulate and agree that this Protective
5 Order (the “Order”) may be entered by the above-entitled Court and that upon its entry by the
6 Court the Order shall govern all Protected Information produced or exchanged in the Action,
7 subject to the terms and conditions set forth herein.

8 **I. APPLICABLE RULES REMAIN UNCHANGED**

9 Nothing herein shall alter or change in any way the discovery provisions of the Federal
10 Rules of Civil Procedure (“Federal Rules”), the Local Rules of the United States District Court
11 for the District of Nevada (“Local Rules”), or the Court’s Scheduling Order. Identification of any
12 individual pursuant to this Protective Order does not necessarily make that individual available
13 for deposition or any other form of discovery outside of the restrictions and procedures of the
14 Federal Rules or the Local Rules. Nothing in this Order shall be construed to require a Party to
15 produce or disclose information not otherwise required to be produced under the Federal Rules,
16 Local Rules, or orders of this Court.

17 **II. CONFIDENTIAL INFORMATION**

18 For purposes of the Order, the following definitions shall apply:

19 A. “Document(s)” has the meaning set forth in Federal Rule 34(a), and includes all
20 tangible written, recorded (electronically or otherwise), or graphic material, whether produced or
21 created by a Party or another person, and whether produced pursuant to the Federal or Local
22 Rules, by agreement of the Parties, or otherwise, and includes, without limitation, documents,
23 interrogatory responses, responses to requests for admissions, deposition transcripts and exhibits,
24 pleadings, motions, affidavits, affirmations, declarations, and briefs, or any portion of any of the
25 above.

26 B. “Confidential Information” means any information that a Party or the producing
27 person or entity believes in good faith constitutes any trade secret or other confidential research,
28 development, financial, or proprietary commercial information within the meaning of Federal

1 Rule 26(c)(7). Parties shall designate or mark Confidential Information with a conspicuous
2 “CONFIDENTIAL” label or legend.

3 C. “Confidential Document” means any Document containing Confidential
4 Information and the Parties shall designate or mark Confidential Documents with a conspicuous
5 “CONFIDENTIAL” label or legend.

6 **III. DISCLOSURE OF CONFIDENTIAL INFORMATION**

7 1. Confidential Documents and Information shall not be used or shown,
8 disseminated, or in any way communicated to anyone for any purpose whatsoever, except as
9 provided for below.

10 2. Confidential Documents and Information that are designated “CONFIDENTIAL”
11 may be disclosed only to the following persons (“Qualified Persons”):

12 a. Members or management for each Party, provided that each such
13 representative is involved in the prosecution or defense of this Action and has the need to
14 know such information in the prosecution or defense of this Action.

15 b. Retained and in-house counsel for the Parties to this Action, including their
16 paralegal assistants and secretaries, and employees or agents of counsel, including jury
17 and graphics consultants and copying or document scanning personnel retained by
18 counsel, to the extent reasonably necessary to render professional services in this Action,
19 including appeals;

20 c. Persons identified in a document designated as “CONFIDENTIAL” as an
21 author of the document in part or in whole, or persons identified on the document as one
22 to whom a copy of such document was sent prior to its production in this action;

23 d. Deposition Witnesses where at least one of the following conditions
24 applies:

25 i. the witness is a current employee of the designating Party;

26 ii. the witness is an author of the document or received the document
27 during the time when such person was an employee of the designating Party;
28

1 iii. the witness's name appears on the Confidential Document or
2 Information as a person who has previously seen or had access to the Confidential
3 Document or Information;

4 iv. the designating Party has consented on the record of the deposition
5 to the showing of the Confidential Document or Information to the witness; or

6 v. the Party wishing to show the witness the Confidential Document
7 or Information notifies the designating Party of that desire, with a specific listing
8 of the Confidential Documents or Information to be so shown, and the designating
9 Party consents in writing to such showing.

10 Witnesses being shown Confidential Documents or Information under
11 subparagraphs (d) (ii), (iii), (iv), or (v) shall not be allowed to retain copies of the
12 Confidential Documents or Information. However, a witness who was shown
13 Confidential Documents or Information during a deposition may review the Confidential
14 Documents or Information while reviewing his or her transcript, provided that any
15 Confidential Documents or Information is not retained by the witness after he or she has
16 completed his or her review of the transcript for accuracy or in preparation for further
17 testimony in the case;

18 e. Court officials and assistants involved in the Action;

19 f. Court reporting personnel involved in taking or transcribing testimony in
20 the Action, provided that any such court reporting personnel agrees that all Confidential
21 Documents and Information designated as such under this Order shall remain
22 “confidential” and shall not be disclosed, except pursuant to the terms of this Order, and
23 that any notes or transcriptions of such testimony (and any accompanying exhibits) will be
24 retained by the reporter or delivered to counsel of record; and

25 g. Outside consultants or experts, including their clerical support staff,
26 retained for the purpose of assisting counsel in the Action.

27 4. Confidential Documents and Information shall be used solely for the prosecution
28 or defense of the Action.

1 5. Notwithstanding the provisions of paragraphs 2 or 3 above, any Party is free to use
2 its own “CONFIDENTIAL” documents and information for any purpose.

3 6. Before any person described in paragraph 2(a), 2(d)(v), or 2(g) is given access to
4 Confidential Documents or Information, the individual to whom disclosure is to be made shall
5 sign and date a Declaration and Confidentiality Agreement substantially in the form of the
6 attached “Exhibit A.” A copy of such executed declaration shall be held by counsel of record for
7 the Party so disclosing the Confidential Documents or Information. The Parties agree not to use
8 the declarations for any purpose other than monitoring and enforcing compliance with this Order.

9 7. Counsel for the Parties to whom Confidential Documents or Information have
10 been furnished shall be responsible for restricting disclosure in accordance with the provisions of
11 this Order.

12 8. Unless otherwise permitted by statute, rule or prior court order, papers filed with
13 the court under seal shall be accompanied by a contemporaneous motion for leave to file those
14 documents under seal, and shall be filed consistent with the court’s electronic filing procedures in
15 accordance with Local Rule IA 10-5. Notwithstanding any agreement among the parties, the
16 party seeking to file a paper under seal bears the burden of overcoming the presumption in favor
17 of public access to papers filed in court. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172
18 (9th Cir. 2006); *see also Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092 (9th Cir.
19 2016).

20 9. Discovery Material shall be designated as follows:

21 a. In the case of documents, designation shall be made prior to production by
22 stamping or writing the word “CONFIDENTIAL” on each page of any such document or, where
23 appropriate, on the first page of an identifiable group of documents. Batches of electronic
24 documents within a production set may be treated as containing the “CONFIDENTIAL”
25 designation provided that the cover and/or device containing the designated electronic documents
26 provides the designation;

1 b. Documents may be produced for inspection prior to their designation as
2 “CONFIDENTIAL” but shall be designated as “CONFIDENTIAL” prior to the transmission of a
3 physical copy of the document to the party requesting the document;

4 c. In the case of interrogatory answers, designation shall be made by
5 stamping or writing the word “CONFIDENTIAL” on the relevant portion of any such answer;
6 and

7 d. In the case of depositions, counsel for any of the Parties or the deponent
8 may designate specific testimony or transcript pages as “CONFIDENTIAL,” (1) at a deposition
9 by notice on the record, or (2) within fourteen (14) days after the receipt of the deposition
10 transcript by notifying counsel for all Parties and for the deponent of the Confidential designation.
11 Until the expiration of the 14-day period, all of the testimony contained in the transcript volume
12 shall be treated as “CONFIDENTIAL.” To the extent that Confidential Documents or
13 Information contained therein are used in depositions, at hearings, or at trial, such documents or
14 information shall remain subject to the provisions of this Order, along with the transcript pages of
15 the deposition testimony and/or trial testimony referring to the Confidential Documents or
16 Information, without the need for further designation.

17 10. At any time after the delivery of Confidential Documents or Information, counsel
18 for the Party or Parties receiving the Confidential Documents or Information may challenge the
19 Confidential designation of all or any portion thereof according to the following procedures:

20 a. If after receipt of documents or information from the producing Party
21 designated “CONFIDENTIAL,” the receiving Party believes all or a portion of the
22 documents or information do not qualify for the designation(s) attached or given thereto,
23 the receiving Party may object in writing to the confidentiality designation(s) of such
24 documents or information. The objection shall set forth with specificity the grounds the
25 receiving Party asserts for maintaining that the documents or information do not qualify
26 for the given confidentiality designation(s). At all times until after resolution of the
27 objection either by the Parties or by the Court, the receiving Party shall treat the
28 documents or information subject to the objection according to designation(s) given by the

1 producing Party, and shall limit access to those documents or information as required by
2 this Order;

3 b. After receipt of the receiving Party's objection, the producing Party shall
4 then have seven (7) calendar days (plus three [3] days if the objection is served other than
5 by hand delivery, e-mail transmission or facsimile transmission) to respond to the
6 objection setting forth with specificity the grounds the producing Party asserts for
7 maintaining that the documents or information do qualify for the given confidentiality
8 designation(s); and

9 c. After receipt of the producing Party's response, the receiving Party shall
10 then have fourteen (14) calendar days (plus three (3) days if response is served other than
11 by hand delivery, e-mail transmission or facsimile transmission) to file a motion and/or
12 objection with the Court seeking to have the Court alter the confidentiality designation(s)
13 of the documents subject to the objection. The producing Party shall bear the burden of
14 establishing that the designated documents or information that are the subject of the
15 objection are properly designated.

16 11. A producing Party that mistakenly fails to mark an item as "CONFIDENTIAL," at
17 the time of production, or fails to provide a written description of orally disclosed Confidential
18 Information, shall not be deemed to have waived, in whole or in part, any claim of confidentiality,
19 either as to the specific documents or information disclosed or as to any other information thereto
20 on the same or related subject matter. In the case of documents, any such mis-designated
21 materials shall be designated as "CONFIDENTIAL" as soon as reasonably possible after the
22 producing Party becomes aware of the failure to mark. Such correction and notice thereof shall be
23 made in writing, accompanied by substitute copies of each item, appropriately marked as
24 Confidential material. Within five (5) days of receipt of the substitute copies, the receiving Party
25 shall return or destroy the previously unmarked items and all copies thereof. In the case of orally
26 disclosed information, a written description of the information must be provided, as set forth
27 above.

1 12. The Party or Parties receiving Confidential Documents or Information shall not
2 under any circumstances sell, offer for sale, advertise, or publicize them.

3 13. After termination of this litigation, the provisions of this Order shall continue to be
4 binding, except with respect to those documents and information that become a matter of public
5 record. The Court retains and shall have continuing jurisdiction over the Parties and recipients of
6 the Confidential Documents and Information for enforcement of the provisions of this Order
7 following termination of this litigation.

8 14. This Order shall apply to any non-party to the Action who may be called upon to
9 make discovery or provide deposition or other testimony in connection with this action, including,
10 without limitation, providing any non-party documents, information, or testimony through
11 discovery taken pursuant to Rule 45. Such non-party shall be deemed to avail itself of the
12 provisions and protections of this Order by making production consistent with it, such as by
13 designating or marking Confidential Documents or Information produced by the non-party with a
14 conspicuous “CONFIDENTIAL,” label or legend.

15 15. The provisions of this Order shall not terminate at the conclusion of the Action.
16 Within thirty (30) days after the final conclusion of all aspects of the Action by judgment not
17 subject to appeal or by settlement, Confidential Documents and all copies of same, and all
18 documents containing or referring to Confidential Information, other than trial and deposition
19 transcripts, trial and deposition exhibits, and briefs, counsel work papers, memoranda, or other
20 documents or papers filed with the Court, and declarations executed in the course of this
21 litigation, shall either be returned to the producing Party or person or destroyed. All Parties or
22 persons that received Confidential Documents, if requested by the producing Party, shall execute
23 a certificate of compliance with this section and shall deliver the same to counsel for the
24 producing Party not more than sixty (60) days after such certification is requested. The Court
25 may return to counsel for the Parties, or destroy, any sealed material at the end of the litigation,
26 including any appeals.

27 16. The mistaken production of documents subject to the protection of the attorney-
28 client privilege, work product doctrine, or other privilege shall not constitute a waiver of such

1 privilege or protection, and does not put in issue or constitute the affirmative use of the advice of
 2 counsel or of any privileged communications. The producing Party shall notify the receiving
 3 Party in writing of any such mistakenly produced documents as soon as reasonably practicable
 4 after the producing Party becomes aware of their mistaken production. Upon receipt of such
 5 notice, the receiving Party shall, within three (3) business days, or sooner if that is practicable,
 6 return all such documents to the producing Party, along with any copies made thereof. In the
 7 event the receiving Party either challenges the assertion of privilege or contends there has been a
 8 waiver, the receiving Party may retain the materials to the extent necessary to make such a
 9 challenge.

10 17. This Order shall be binding upon the Parties and their attorneys, successors,
 11 executors, personal representatives, administrators, heirs, legal representatives, assigns,
 12 subsidiaries, divisions, employees, agents, independent contractors, or other persons or
 13 organizations over which they have control.

14 DATED this 4th day of November, 2022.

DATED this 4th day of November, 2022.

15 PARSONS BEHLE & LATIMER

GRANT & ASSOCIATES

16 /s/ Zachary S. Shea
 17 Ashley C. Nikkel, Nevada Bar No. 12838
 18 Zachary S. Shea, Nevada Bar No. 15094
 19 *Attorneys for Plaintiff Union*
Pacific Railroad Company

/s/ Damian C. Noody
 (Signed by filing attorney with permission of
 counsel)
 Annalisa N. Grant, Nevada Bar No. 11807
 Damian C. Noody, Nevada Bar No. 14409
Attorneys for Defendants

ORDER

20 Paragraph 13 is modified to reflect that although the parties may agree to be bound by the confidentiality terms of this Order beyond the
 21 conclusion of this lawsuit, the dismissal of this action will terminate the jurisdiction of this court.

22 IT IS SO ORDERED.

23 DATED: November 7, 2022

24 
 25 _____
 26 MAGISTRATE JUDGE

EXHIBIT A

FORM DECLARATION AND CONFIDENTIALITY AGREEMENT CONFIRMING RECEIPT AND ACCEPTANCE OF TERMS AND CONDITIONS OF PROTECTIVE ORDER

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNION PACIFIC RAILROAD COMPANY, a
Delaware corporation,

Plaintiff,

v.

PILOT THOMAS LOGISTICS, THOMAS
WEST FUELS LUBRICANTS AND
CHEMICALS, LLC, SIMON PETROLEUM,
INC., and DANIEL S. MCCANN,

Defendants.

Case No. 3:22-cv-00117-LRH-CSD

**DECLARATION AND
CONFIDENTIALITY AGREEMENT
CONFIRMING RECEIPT AND
ACCEPTANCE OF TERMS AND
CONDITIONS OF PROTECTIVE
ORDER**

I, _____, declare that:

1. My address is _____.
2. My present employer is _____.
3. My present occupation or job description is _____.
4. I have received a copy of the Protective Order in this action signed by the Court on _____.
5. I have carefully read and understand the provisions of the Protective Order.
6. I will comply with all of the provisions of the Protective Order.

- 1 7. I will hold in confidence, will not disclose to anyone not qualified under the
2 Protective Order, and will use only for purposes of this action any and all
3 confidential materials disclosed to me in the above-referenced matter.
4
5 8. I will return all confidential material that comes into my possession, and
6 documents or things that I have prepared relating thereto, to counsel for the party
7 by whom I am employed or retained.
8
9 9. I hereby submit to the jurisdiction of this Court for the purposes of enforcement of
10 the Protective Order in this action.
11
12 10. I state under penalty of perjury under the laws of the United States of America that
13 the foregoing is true and correct.

14 Dated: _____

Signature

Printed Name